

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
MERLYN G. DIVENS AND
DIVENS ENTERPRISES,

Appellants,

v.

SOUTHWEST AIR POLLUTION
CONTROL AUTHORITY,

Respondent.

PCHB No. 79-10

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeal of a \$ 50 civil penalty for outdoor burning; having come on regularly for formal hearing before the Pollution Control Hearings Board on the 7th day of March, 1979, at Longview, Washington, and appellant, Merlyn G. Divens, Divens Enterprises, appearing pro se, and respondent, Southwest Air Pollution Control Authority, appearing through its attorney, James D. Ladley; and hearing examiner William A. Harrison presiding, and the Board having considered the exhibits, records and files herein and having reviewed the Proposed Findings of Fact, Conclusions of Law and Order of the presiding officer mailed to the

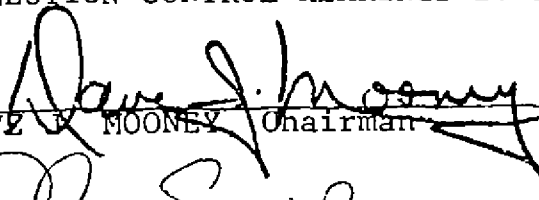
1 parties on the 16th day of March, 1979, and more than twenty days having
2 elapsed from said service, and


3 The Board having received no exceptions to said Proposed Findings of
4 Fact, Conclusions of Law and Order and the Board being fully advised in
5 the premises; now therefore,

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed Findings
7 of Fact, Conclusions of Law and Order dated the 15th day of March, 1979,
8 and incorporated by reference herein and attached hereto as Exhibit A,
9 are adopted and hereby entered as the Board's Final Findings of Fact,
10 Conclusions of Law and Order herein.

11 DONE at Lacey, Washington this 16TH day of April, 1979.

12 POLLUTION CONTROL HEARINGS BOARD

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14 DAVE J. MOONEY, Chairman

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16 CHRIS SMITH, Member

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18 DAVID AKANA, Member

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24 FINAL FINDINGS OF FACT,
25 CONCLUSIONS OF LAW
26 AND ORDER
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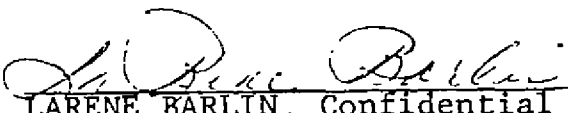
CERTIFICATION OF MAILING

I, LaRene Barlin, certify that I mailed, postage prepaid, copies of the foregoing document on the 17th day of April, 1979, to each of the following-named parties at the last known post office addresses, with the proper postage affixed to the respective envelopes:

Mr. Merlyn G. Divens
Divens Enterprises
5305 Idaho Street
Vancouver, Washington 98661

Mr. James D. Ladley
Attorney at Law
P. O. Box 938
Vancouver, Washington 98666

Southwest Air Pollution Control Authority
7601-H Northeast Hazel Dell Avenue
Vancouver, Washington 98665


LARENE BARLIN, Confidential Secretary
POLLUTION CONTROL HEARINGS BOARD

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
MERLYN G. DIVENS AND)
DIVENS ENTERPRISES,)
)
Appellants,)
)
v.)
)
SOUTHWEST AIR POLLUTION)
CONTROL AUTHORITY,)
)
Respondent.)
)

PCHB No. 79-10

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a \$50 civil penalty for outdoor burning allegedly in violation of respondent's Section 4.01 of Regulation I, came before the Pollution Control Hearings Board on March 7, 1979 in Longview, Washington. Hearing examiner William A. Harrison presided alone. Appellant appeared and represented himself. Respondent was represented by its attorney, James D. Ladley. Olympia reporter Susan Cookman recorded the proceedings. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Witnesses were sworn and testified. Exhibits were examined.

From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Respondent, pursuant to RCW 43.21B.260, has filed with this Board a certified copy of its Regulation I containing respondent's regulations and amendments thereto of which official notice is taken.

II

Appellant, Merlyn G. Divens, is a building contractor and has been in that business for approximately one year. At times pertinent to this appeal he owned a residential lot at 3319 N.E. 124th Avenue, Vancouver, and served as a general contractor for the purpose of constructing a "spec." house for sale to others. On December 21, 1978 while appellant was personally absent from the site, a subcontractor working out of doors built a small fire to warm himself in the prevailing cold, wet, winter weather. Specifically, the subcontractor took four or five pieces of scrap wooden house siding, each about one foot long, put them into an open metal barrel and ignited them. Upon returning to the job site, appellant became aware of a fire and its purpose, and made no attempt to order the fire extinguished. The waste materials from this construction job and from all other construction jobs conducted by appellant are hauled to a waste disposal site, and the appellant allowed this fire to continue burning solely because it was for warming purposes and not for waste disposal.

Appellant neither applied for nor obtained any permit from respondent for the fire in question.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

III

While investigating another incident in the vicinity, respondent's inspector observed flame and some smoke arising from the barrel, just described, at 2:10 p.m. This observation was made from the roadway although the inspector subsequently parked in the drive next door and went to the fire site to talk with the appellant and others. The inspector explained that warming fires on construction sites are prohibited, and issued a field notice of violation. Appellant later received a Notice of Violation assessing a civil penalty in the amount of \$50. From this, appellant appeals.

IV

The appellant had no prior record of violating respondent's regulations.

V

Any Conclusion of Law hereinafter recited which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

The pertinent provisions of respondent's Section 4.01 of Regulation I provide:

Open Fires: No person shall ignite, cause to be ignited, permit to be ignited, or suffer, allow, or maintain any open fire within the jurisdiction of the Authority, except as provided in this Regulation.

(a) The following fires are excepted from provisions of this regulation:

FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

(1) Fires set only for recreational purposes and cooking of food for human consumption, provided no nuisance is created.

(2) Any fire specifically exempt under Section 42, of Chapter 238, RCW 70.94.250.

(b) Open burning may be done under permit:

(1) Application for burning permits shall be on forms provided by the local fire department.

(2) No permit shall be issued unless the Control Officer is satisfied that:

(i) No practical alternate method is available for the disposal of the material to be burned.

(ii) No salvage operation by open burning will be conducted.

(iii) No garbage will be burned.

(iv) No dead animals will be disposed of by burning.

(v) No material containing asphalt, petroleum products, paints, rubber products, plastic or any substance which normally emits dense smoke or obnoxious odors will be burned.

. . . .

II

Appellant suffered, allowed, or maintained the open fire in question.

III

Respondent's Section 4.01 of Regulation I allows certain specific outdoor fires without a permit from respondent. One of these is an outdoor fire for "recreational purposes" which appellant contends was the purpose of this fire. We disagree. This was a warming fire set by workman to facilitate their commercial work. As such, it cannot

be deemed recreational nor does it come within the other categories of outdoor fires allowed without permit. Section 4.01(a). It follows that the fire required a permit and, there being none, appellant violated respondent's Section 4.01(b) of Regulation I.

IV

Appellant contends that this violation cannot be sustained because respondent's inspector did not possess a search warrant when entering appellant's land. This is beside the point. Appellants' fire was in plain view to the inspector while he was upon the public roadway. The testimony of the inspector based on his observation of the fire from the roadway, combined with other evidence in this case is sufficient to prove the violation. No search warrant is required to observe from a public place that which is in plain view, and thus no search warrant was needed to sustain this violation.

V

The fire in question represents a minor infraction of respondent's rules, and because appellant has no prior record of violating these rules, the penalty should be mitigated by suspension.

VI

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Pollution Control Hearings Board makes this

ORDER

The \$50 civil penalty is affirmed, provided however, that it is suspended on condition that appellant not violate respondent's

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 regulations for a period of six months from the date of appellants'
2 receipt of this Order.

3 DATED this 15th day of March, 1979.

4 POLLUTION CONTROL HEARINGS BOARD

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7 WILLIAM A. HARRISON
8 Presiding Officer
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26 FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
AND ORDER